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Procedural Issues in the Anti-Dumping Regulations of China: A Critical Review under the WTO Rules

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Procedural Issues in the Anti-Dumping Regulations of China: A Critical Review under the WTO Rules

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Abstract

Since the World Trade Organization (WTO) was established, China has made large-scale efforts to shape its trade remedy system through legal and organizational changes. Through these changes, China could clarify the meanings of WTO anti-dumping provisions including the provision relating to the definition of domestic industry. Moreover, procedural disciplines on reviews were fortified in Chinese anti-dumping system. While the overall improvements to the trade remedy system of China are evident, definitions of several key legal terms, including the concept of ''related producers'', the negligible import standard, and adjustment factors for a fair comparison between normal values and export prices are still absent, and some legal problems relating to price undertakings and the countermeasure system remain to be solved. China should continue to proceed with the task of clarification and improvement of its trade rules.

I. Introduction

China has taken steps to reform and modernize its trade regulatory system in its bid to enter the World Trade Organization (WTO),[1] and as a result of pressure from its trading partners. As China has accelerated its market liberalization process after the establishment of the

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1 The WTO was established on 1 January 1995 as a result of Uruguay Round negotiations (1986–1994). As of December 2005, 149 economies are Members to the WTO.

WTO, tariff and non-tariff barriers to trade have been substantially relaxed.[2] As a result, it has been necessary to protect some domestic industries which are unable to compete with foreign exporters and to provide remedies for injuries to domestic firms caused by unfair trade practices. Therefore, China has made large-scale efforts to build its trade remedy system in its short history of trade remedy regulation.

The principal law governing foreign trade relations of China is the "Foreign Trade Law of the People's Republic of China".[3] This law comprises 11 chapters covering general provisions, foreign trade dealers, import and export of goods and technologies, international trade in services, protection of trade-related aspects of intellectual property rights, foreign trade order, foreign trade investigations, foreign trade remedies, foreign trade promotion, legal liabilities and supplementary provisions. Anti-Dumping Regulations is included in the chapter on foreign trade remedy measures.

In order to elaborate these rules on the trade remedies, the State Council of China promulgated rules and procedures on anti-dumping and countervailing duties in 1997, which is the "Anti-Dumping and Anti-Subsidy Regulations of the People's Republic of China"[4] (often called the "old Regulations"). When the Regulations was drafted, the only experience China had in regard to anti-dumping regulations was defending its firms in anti-dumping investigations conducted by other WTO members. It was not until the end of 1997 that China initiated its first anti-dumping investigation in the newsprint case.[5] Therefore, even though the regulations had been drafted by referring to the WTO Anti-Dumping and Subsidy and Countervailing Measures (SCM) Agreements,[6] many of its provisions were rather general, offering little guidance on how to apply the rules in practice. Moreover, several provisions were different from those of the WTO agreements.[7] During China's accession negotiation to the WTO, some WTO Members raised concerns that as a result of applying these provisions, trade remedy investigations by Chinese authorities would be found to be inconsistent with WTO rules if China were a Member of the WTO.[8]

2 For example, Ms. Shi Miaomiao, the Deputy Director General of the WTO Division of the Ministry of Commerce (MOFCOM) of China, noted that the average tariff rate has fallen from 43% in 1992 to 9.9% in 2005. See Shi Miaomiao, China's Participation in the Doha Negotiations and Implementation of Its Accession Commitments, in Henry Gao and Donald Lewis (eds), China's Participation in the WTO, Cameron May, London, 2005, 28.

3 Foreign Trade Law of the People's Republic of China (). This law was adopted at the Seventh Session of the Standing Committee of the Eight National People's Congress on 12 May 1994, and made effective on 1 July 1994. It was amended in April 2004 and the new amendments took effect from 1 July 2004.

4 Anti-Dumping and Anti-Subsidy Regulations of the People's Republic of China (), adopted by Order 214 of the State Council of the People's Republic of China on 25 March 1997.

5 On 10 December 1997, the Chinese anti-dumping authority (MOFTEC) received a petition by Chinese Newsprint manufacturers and initiated the first anti-dumping investigation under the new Regulations by targeting Newsprint (HTS 4801.000) imported from the United States, Canada, and Korea. Zhang and Li, First Sword against Dumping, 135 China International Business (MOFTEC) 8 (1998).

6 See Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001, para. 148.

7 For example, the basis for calculating dumping margins for a preliminary affirmative determination was not disclosed to interested parties, and the determination of injury and causation was not based on an objective examination of sufficient evidence. See above n.6. para.147.

As part of its accession package, China committed to make its trade laws and regulations compatible with the WTO agreements.[9] Thereafter, China repealed the old regulations and enacted two new Regulations, i.e. the "Anti-Dumping Regulations"[10] and the "Anti-Subsidy Regulations"[11] by separating anti-dumping issues from subsidy-countervailing issues. These Regulations became effective on 1 January 2002, shortly after the National People's Congress of China ratified its accession to the WTO. The new Anti-Dumping Regulations prescribes detailed and comprehensive rules on anti-dumping with 59 articles over six chapters. These rules were elaborated by many provisional rules promulgated by the then MOFTEC and the State Economics and Trade Commission (SETC).

According to Article 71 of the Law on Legislations of China,[12] for subject matters within their spheres of authority, ministries, commissions and other subsidiary bodies under the State Council may issue implementing rules pursuant to national laws, administrative regulations and decisions and orders of the State Council. In practice, these rules often take the form of provisional rules where there is no law or administrative regulations currently in place, or where the National People's Congress or the State Council is not yet ready to draft legislation for a specific subject but there is an urgent need for the regulations.[13] Provisional rules are intended to be gradually replaced by definitive laws or administrative regulations.[14]

Pursuant to the National People's Congress Decision on the Institutional Reform of the State Council[15] and State Council's Notice on Institutional Organization,[16] the central government of China went through a major restructuring in March 2003. As a result, the Ministry of Commerce (MOFCOM) was established to take over parts of the responsibilities of the MOFTEC and SETC, which include the role of regulating dumping and subsidy practices.[17] In light of this organizational change, the Anti-Dumping and Anti-Subsidy Regulations were revised in March 2004 and made effective on 1 June 2004. The Anti-Dumping Regulations of 2004 covers a wide variety of subjects ranging from the determination of dumping, calculation of margins, injury determinations, investigation procedure, anti-dumping duty, price undertaking, sunset review and notifications. In

8 Above n.6, para.147.

9 Above n.6, para.148.

10 Anti-Dumping Regulations of the People's Republic of China, promulgated by Order 328 of the State Council of the People's Republic of China on 26 November 2001.

11 Anti-Subsidy Regulations of the People's Republic of China, promulgated by Order 329 of the State Council of the People's Republic of China on 26 November 2001.

12 Lifa Fa, adopted by the Third Session of the Ninth People's Congress on 15 March 2000 and took effect from 1 July 2000.

13 See Daniel Chow, The Legal System of the People's Republic of China in a Nutshell (Thomson & West, 2003), 142–54.

14 Above n.13.

15 This decision was adopted at the First Session of the Tenth People's Congress on 10 March 2000.

16 Notice 8 of 2003 issued on 21 March 2003.

17 See e.g. Institutional History of the MOFCOM, available at http://www.mofcom.gov.cn/mofcom/yange.shtml (last checked on 30 July 2006). See also, Treaty and Law Division of the MOFCOM eds., Interpretation of the Foreign Trade Law of the People's Republic of China, China Commerce and Trade Press, Beijing, 2004, 173.

October 2003, MOFCOM promulgated the "Rules on Industry Injury of Anti-Dumping Investigation"[18] and the "Rules on Industry Injury of Anti-Subsidy Investigation."[19]

This article will analyse the anti-dumping legal system of China focusing on its procedural aspects. For this purpose, the Foreign Trade Law, the Anti-Dumping Regulations, the provisional rules and the MOFCOM rules will be examined. Procedural rules under these laws and regulations will be compared with those of the WTO Anti-Dumping Agreement in order to examine whether the Chinese anti-dumping laws and regulations are consistent with the WTO rules.[20]

II. WTO consistency of anti-dumping investigation and determination procedure

II.A. Petition for investigation, and determination of the scope of domestic industry

The Foreign Trade Law of China grants "the authority to conduct anti-dumping investigations" to a State Council ministry responsible for foreign trade.[21] According to the National People's Congress Decision on the Institutional Reform of the State Council and State Council's Notice on Institutional Organization, this authority is currently exercised by MOFCOM, which may either initiate the investigations by itself or upon receiving petitions from domestic industry.[22] The Anti-Dumping Regulations of China recognizes the right of petition by providing that "a domestic industry or a natural person, legal person or relevant organization representing a domestic industry may file a written application for an anti-dumping investigation to the MOFCOM".[23]

The issue of standing to file petitions is prescribed in the Provisional Rules on Initiation of Anti-Dumping Investigations.[24] According to these rules, an application is considered to have been made by or on behalf of the domestic industry and an anti-dumping investigation may be initiated, if the application is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total output of the like products produced by that portion of the domestic industry expressing either support for or opposition to the application and such output accounts for at least 25 per cent of total production of the like domestic product.[25] If the domestic industry is fragmented and involving a large number of

18 Rules on Industry Injury in Anti-Dumping Investigations (), promulgated on 17 October 2003, became effective on 17 November 2003.

19 Rules on Industry Injury in Anti-Subsidy Investigations (), promulgated on 17 October 2003, became effective on 17 November 2003.

20 Due to time constraint, this paper will focus on the black letter law of the anti-dumping procedures only, with the review of the relevant case law to be left for another study later.

21 Chapter 7 of Foreign Trade Law.

22 Articles 13, 16 and 18 of the Anti-Dumping Regulations.

23 Article 13 of the Anti-Dumping Regulations; Articles 4 and 10 of Provisional Rules on Initiation of Anti-Dumping Investigation. The application must be submitted to the Bureau of Fair Trade for Imports and Exports () of MOFCOM. See Article 30 of the Provisional Rules.

24 Adopted on 10 February 2002, became effective on 13 March 2002.

producers, MOFCOM may examine the standing of the applicant by using statistically valid sampling methods.[26]

According to the Chinese regulations and provisional rules, the term ''domestic industry'' means the domestic producers as a whole of the like products within China or those of them whose collective output of the product constitutes a ''major proportion'' of the total production of those products,[27] and ''major proportion'' means ''more than 50 per cent.''[28] Certain domestic producers are excluded from the scope of the domestic industry when the producers are ''related'' to the exporters or importers, or are ''themselves importers'' of the dumped imports or like products.[29]

In addition, the provisional rules include a ''regional industry'' concept. According to this, the producers located in a certain area of the domestic market may be regarded as a separate industry (regional industry), provided that they sell all or almost all of their production of the like products in that market, and the demand for the like products in that market is not to any substantial degree supplied by the producers located elsewhere in China.[30] When determining such a regional industry, sales performance and demands for the product in the region must be taken into account.[31]

Several aspects of these Chinese rules and regulations can be examined by comparison with WTO jurisprudence. The first point of analysis is the concept of domestic industry. How to define the concept of ''domestic industry'' is an issue necessarily related to such matters as standing, injury determination, and the scope of products subject to anti-dumping duties. According to the WTO Anti-Dumping Agreement, the term 'domestic industry' refers to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes ''a major proportion'' of the total domestic production of like products.[32] Because the term ''a major proportion'' is not defined in the WTO Anti-Dumping Agreement, controversy may arise as to the interpretation of the term.

In *Argentina-Poultry Anti-Dumping Duties*,[33] for example, Brazil as the complaining party claimed that, because ''a major proportion'' means ''the majority'' (i.e., more than 50 per cent), Argentina violated WTO rules by defining the domestic industry as producers

25 Article 17, Anti-Dumping Regulations; Article 6, Provisional Rules on Initiation of Anti-Dumping Investigations.

26 Article 7, Provisional Rules on Initiation of Anti-Dumping Investigations.

27 Article 11, Anti-Dumping Regulations.

28 Article 5, Provisional Rules on Initiation of Anti-Dumping Investigations.

29 Article 11, Anti-Dumping Regulations; Article 8, Provisional Rules on Initiation of Anti-Dumping Investigations.

30 Article 9, Provisional Rules on Initiation of Anti-Dumping Investigations.

31 Article 14, Provisions on Industry Injury in Anti-Dumping Investigations, Order No. 5 (2003) of the Ministry of Commerce issued on October 17, 2003.

32 Article 4.1, WTO Anti-Dumping Agreement.

33 Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003.

whose collective output constituted 46 per cent of the total domestic production and collecting injury data as to those producers.[34]

Against this claim, Argentina (the defending party) and the United States and EC (third parties) argued that the use of the words "*a* major proportion"—different from "*the* major proportion"—indicate that there could be more than one major proportion. According to them, "a major proportion" means an "unusually important, serious or significant" proportion, not necessarily the majority.[35] As reasons for this interpretation the United States and EC submitted that:

(i) the fact that the drafters of the domestic industry clause did not explicitly state "50 per cent" as opposed to the case of Article 5.4 (50 per cent standing requirement) shows that they intended a different standard;[36]
(ii) according to Article 5.4, an application may be considered to have been made "on behalf of the domestic industry" even if the producers which support it represent less than 50 per cent of the domestic production. With the same token, "a major proportion" in Article 4.1 can be less than 50 per cent;[37]
(iii) Article 4.1 merely contains a definition of "domestic industry", and does not impose any obligation on Members.[38]

While denying the US claim that Article 4.1 is a mere definition clause, the panel agreed with the United States and EC that it is permissible to define the "domestic industry" in terms of domestic producers of an important, serious or significant proportion of total domestic production.[39]

This issue is also hotly debated in the current DDA negotiations on Rules. The Anti-Dumping Friends Group,[40] for example, has proposed the 50 per cent threshold rule. According to the group, this clear threshold, if adopted, could enhance consistency of injury determinations in anti-dumping investigation procedures.[41] Regardless of which approach is used, the Chinese Regulations seems to be consistent with WTO rules because "more than 50 per cent" certainly qualifies as a "major" proportion. This rule is a good example of clarification of the meaning of WTO provisions.

Second, the scope of producers excluded from the concept of domestic industry is another point of analysis. The WTO Anti-Dumping Agreement enables its members to exclude from the scope of domestic industry the so-called "related producers", i.e. domestic producers who

34 Panel report, *Argentina-poultry Anti-Dumping Duties*, para. 7.329.

35 Above n.33, paras. 7.330 and 7.331.

36 Above n.33, para. 7.331.

37 Above n.33, para. 7.334.

38 Above n.33, para. 7.331.

39 Above n.33, paras. 7.338 and 7.341.

40 This group consists of 15 states including Korea, Japan, Chile, Brazil, Hong Kong, Mexico, and Thailand, which are mostly export-oriented economies.

41 TN/RL/W/31. China and Canada seem to support this proposal by stressing the necessity to have certain numerical threshold in defining the scope of domestic industry. TN/RL/W/66, TN/RL/W/47.

are ''related'' to the exporters or importers or are ''themselves importers'' of the allegedly dumped product.[42] The Agreement has the following definition clause for the word ''related'' which uses the relationship of ''control'' as the major criterion.

> Producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.[43]

Under the Chinese rules, investigating authorities may exclude domestic producers who are ''related'' to the exporters or importers or are ''themselves importers'' of the allegedly dumped product.[44] A problem of inconsistency may arise, however, if an excessive exclusion occurs. What is enabled by the WTO agreement is to exclude certain related producers as defined by the Anti-Dumping Agreement. The Anti-Dumping Agreement imposes two-fold conditions to qualify as ''related producers'': (i) existence of the relationship of ''control''; and (ii) any grounds for suspecting that effects of the relationship will cause the producer concerned to behave differently from non-related producers.[45] Given that they are substantive requirements for the exclusion of related producers, the burden of proving whether these conditions are met in a specific case must be borne by the side that is attempting to exclude certain producers from the scope of domestic industry by the reason of alleged existence of control relationship. That is, if an investigation authority tries to circumscribe a domestic industry by excluding certain domestic producers, the authority is not only required to establish that there is a control relationship between the producers and exporters or importers, but also is required to present any grounds of suspicion that the relationship will cause their different behaviour. Therefore, if the authority, when making related producer determinations, omits examinations of either condition or shifts its burden of proof to exporters or petitioners, WTO rules in this regard will be violated.

It is possible that MOFCOM may define related producers in a broader sense than as defined under the WTO agreement. This may happen, for example, when the second condition is not examined, or in the case of the shift of the burden of proof. If such broader interpretation occurs, any producers who are otherwise unrelated to exporters or importers could be treated as related producers and excluded from the scope of domestic industry.

42 Article 4.1, WTO Anti-Dumping Agreement.

43 Footnote 11, Anti-Dumping Agreement (for the purpose of this provision, ''one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter''.)

44 Article 11, Anti-Dumping Regulations; Article 8, Provisional Rules on Initiation of Anti-Dumping Investigations; Article 13, Provisions on Industry Injury in Anti-Dumping Investigations (issued by the MOFCOM on 17 October, 2003).

45 It is debatable whether the second condition applies to all of items ''(a), (b) and (c)'' in footnote 11 of the Anti-Dumping Agreement or it applies only to item ''(c)''. Although both interpretations are grammatically possible, the authors are of the view that the condition applies to all cases, because the consideration behind the second condition is equally applicable to all three items and there is no reason to apply it to one but not to the others.

Given that there is no definition clause of the term ''related'' under the Chinese law and regulations (as opposed to in the WTO agreement), such possibility of excessive exclusion and WTO inconsistency is always latent.

Third, it seems that the regional industry provision under the Chinese Regulations is consistent with the WTO Anti-Dumping Agreement[46] in that both are stipulating the same factors (i.e. sales performance and demands) as criteria to recognize a separate domestic industry. Even though it has been rarely used, in practice, by the MOFCOM, this provision is very useful to China given the great size of the Chinese territory. According to WTO rules, once a regional industry is recognized, anti-dumping duties should be levied in principle only on the products in question consigned for final consumption to that specific region.[47] This point must be kept in mind by Chinese authorities in making decisions.

II.B. Initiation of investigation

According to Anti-Dumping Regulations of China, within 60 days from petitions, MOFCOM must examine contents of the application, the evidence, and whether the application is made by or on behalf of the domestic industry, and decide whether or not to initiate the investigation.[48] The Regulations state that MOFCOM must notify the decision of initiation to the government of the exporting country prior to the decision.[49] This prior notification obligation conforms to the requirement under the WTO Anti-Dumping Agreement.[50]

In exceptional circumstances, MOFCOM may proceed to an anti-dumping investigation by self-initiation. In order to do this, MOFCOM must have sufficient evidence of dumping, injury and causality between the two.[51] This self-initiation mechanism and its conditions are consistent with the WTO anti-dumping rules.[52]

According to the Chinese Regulations, MOFCOM must terminate an investigation in any of the following circumstances:

(i) the application has been withdrawn by the applicant;
(ii) there is no sufficient evidence of the existence of dumping, injury and the causal link between the two;
(iii) the margin of dumping is less than 2 per cent;

46 Article 4.1, Anti-Dumping Agreement.

47 Article 4.2, Anti-Dumping Agreement.

48 Article 16, Anti-Dumping Regulations; Article 33, Provisional Rules on Initiation of Anti-Dumping Investigations.

49 Article 16, Anti-Dumping Regulations.

50 Article 5.5, Anti-dumping Agreement.

51 Article 18, Anti-Dumping Regulations; Article 42, Provisional Rules on Initiation of Anti-Dumping Investigations.

52 According to the Anti-Dumping Agreement, in ''special circumstances'', the authorities may initiate investigations without having received a petition. See Article 5.6 of Anti-Dumping Agreement.

(iv) the actual or potential volume of dumped imports or the injury is negligible;
(v) other circumstances that MOFCOM considers not appropriate to continue the anti-dumping investigation.[53]

These grounds for termination seem to be compatible with WTO anti-dumping rules because they largely correspond with those under the WTO Anti-Dumping Agreement, including the 2 per cent standard of *de minimis* dumping margin.[54] Controversy might arise, however, in regard to the "negligible imports" standard. According to WTO rules, if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like products in the importing Member, the volume of dumped imports must be regarded as negligible, and the authority must terminate the investigation procedure.[55] In comparison, under the Chinese Anti-dumping Regulations, the 3 per cent negligible import standard is stated in Article 9 which is about the cumulative assessment of dumping, whereas such a standard is not stated in Article 27, a general provision dealing with any negligible import situations.[56] Theoretically, one might doubt whether the MOFCOM would use the 3 per cent standard in assessing whether the volume of dumped imports is negligible in contexts other than those in which "dumped imports from more than one country"[57] are cumulatively assessed. Therefore, a breach of WTO rules will occur if MOFCOM initiates any investigations, or do not terminate any investigations, even though the volume of dumped imports from a particular country account for less than 3 per cent of imports of the like products in China. In practice, however, the MOFCOM has adopted the 3 per cent standard as the threshold for determining negligible imports in all scenarios.

II.C. Determination of dumping margin

The margin of dumping is the amount by which the export price of an imported product is less than its normal value. Therefore, how to compare the export price with the normal value is an important issue in determining dumping margins.

According to Anti-Dumping Regulations of China, MOFCOM may choose two methods of comparison: first, compare the weighted average normal value with the weighted average prices in all comparable export transactions ("A-to-A comparison"); second, compare the normal value with the export price on a transaction-to-transaction basis ("T-to-T comparison").[58] Where the export prices differ significantly among different purchasers, regions or time periods, and therefore it is difficult to make comparison by using these methods, comparison may be made between the weighted average normal value and prices of individual export transactions ("A-to-T comparison").[59] These provisions resulted from efforts to

53 Article 27, Anti-Dumping Regulations.
54 Articles 5.3, 5.4 and 5.8, Anti-Dumping Agreement.
55 Article 5.8 of the Anti-Dumping Agreement.
56 Compare Articles 9 with 27, Anti-Dumping Regulations.
57 Article 9, Anti-Dumping Regulations.
58 Article 6, Anti-Dumping Regulations.

elaborate and improve the rules under the old Regulations, which had simply provided that export prices and normal values should be compared according to ''fair and reasonable means''.[60]

According to the WTO Anti-Dumping Agreement, the investigating authorities may use the A-to-T comparison method only in exceptional circumstances.[61] If the method is used, the authorities must ''provide an explanation'' as to why it is not appropriate to take normal A-to-A or T-to-T comparison methods.[62] This means that a burden of showing an existence of the exceptional circumstances must be borne by the investigating authorities.

Under Chinese Regulations, the authorities may adopt the A-to-T method in exceptional circumstances, but there is no explicit obligation for the authority to explain its reason. As a consequence, in many investigations, the burden of proving exceptional circumstances might be shifted from the authority to the exporters or producers subject to investigations. Moreover, under the WTO anti-dumping rules, WTO panels may only determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.[63] Hence, if a WTO dispute arises against MOFCOM's use of A-to-T methods, the complaining party must not only prove that there were no special circumstances, but also show that MOFCOM's evaluation of facts (i.e. MOFCOM's decision that there exist special circumstances) was biased and not objective. This is a heavy burden for the exporters or producers subject to anti-dumping investigations. If MOFCOM, upon using the A-to-T method, does not explain why normal methods of comparison cannot be used in light of a pattern of export prices which differ significantly among different purchasers, regions or time periods, violation of WTO rules may occur.

Another problem in the Chinese legal system is that notwithstanding amendment of the old Regulations, it has not specified what kinds of adjustment factors must be considered in making a fair comparison between normal values and export prices. For such consideration, the WTO Anti-dumping Agreement elaborates various factors in terms of time and transaction level of comparison.[64] The issues of conversion of currencies and fluctuations in exchange rates are also addressed.[65] By comparison, Chinese Regulations have a simple clause of principle providing that ''A fair and reasonable comparison shall be made between the export price and the normal value of an imported product, with due allowance for factors which affect price comparability''.[66] What are these factors and how to consider

59 Above n.57.

60 Article 6, Anti-Dumping and Anti-Subsidy Regulations.

61 Article 2.4.2, Anti-Dumping Agreement.

62 Above n.60. (''. . . if an *explanation is provided* as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.'') (emphasis added).

63 Article 17.6, Anti-Dumping Agreement.

64 Article 2.4, Anti-Dumping Agreement.

65 Article 2.4.1, Anti-Dumping Agreement.

66 Article 6, Anti-Dumping Regulations (''. . . '').

them are questions that are totally left to the discretion of Chinese authorities. Such wide discretion might be inconsistent with WTO rules.

II.D. Price undertakings

During the period of an anti-dumping investigation, an exporter of the dumped imports may offer MOFCOM an undertaking to revise its prices or to cease exporting at dumped prices.[67] This undertaking is called the "price undertaking". Provisional Rules on Price Undertaking of China defines it as follows:

> The term "Price Undertakings" mentioned in these Rules refers to undertakings voluntarily offered to [MOFCOM] by exporters and producers who have responded to an antidumping investigation by way of revising prices or ceasing exports of the product under investigation at dumped prices, and accepted by [MOFCOM], in order to suspend or terminate the said investigation.[68]

MOFCOM may make price undertaking offers, but it must not force exporters to accept the offers.[69] The fact that exporters or producers do not offer a price undertaking or do not accept a suggested price undertaking must in no way prejudice the proper investigation and determination of dumping and dumping margin.[70] If MOFCOM considers that price undertaking offers made by exporters are acceptable, it may decide to suspend or terminate the anti-dumping investigation without applying provisional anti-dumping measures or imposing anti-dumping duties.[71] The decision of suspension or termination must be published.[72] If MOFCOM does not accept a price undertaking offer, it must provide reasons for the non-acceptance to the exporters concerned.[73] Price undertakings must not be sought or accepted unless the investigating authorities have made a preliminary affirmative determination of dumping and injury.[74]

Notwithstanding the suspension or termination of the investigation, MOFCOM may still continue the investigation of dumping and injury upon the request of the exporters or if itself deems necessary.[75] Upon the conclusion of such investigation, the price undertaking will either automatically lapse if a negative determination is made on dumping or injury, or remain in force if the determination is affirmative.[76] MOFCOM may require the exporter

67 Article 31, Anti-Dumping Regulations.

68 Article 3, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.

69 Article 31, Anti-Dumping Regulations; Articles 4 and 5, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.

70 Article 32, Anti-Dumping Regulations; Article 5, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.

71 Article 33, Anti-Dumping Regulations.

72 Above n.70.

73 Above n.70.

74 Above n.70.

75 Article 34, Anti-Dumping Regulations.

76 Above n.74.

from whom an undertaking has been accepted to periodically provide information and documentation relevant to the fulfillment of such an undertaking, and verify such information and documentation.[77] These powers of the MOFCOM are necessary to monitor status of implementations of undertaking agreements.

Other than these provisions, Chinese rules and regulations have many detailed procedural provisions on price undertakings. Most of them do not conflict with the WTO Agreement because they address procedural issues that are not covered in the WTO Agreement.

However, two aspects of Chinese rules might be inconsistent with WTO rules. First, the Provisional Rules on Price Undertakings provide that MOFCOM may accept only undertaking proposals submitted by "exporters who have been sufficiently cooperative during the investigation procedure".[78] According to the WTO Agreement, undertakings offered need not be accepted if the authorities consider their acceptance "impractical" or for reasons of "general policy", and upon rejecting, authorities should provide to the exporter the reasons of rejection and an opportunity to make comments.[79]

Absent a standard of determination of being "sufficiently cooperative" and without a consistent application of the standard to actual cases, it will be difficult to see that any rejection of undertaking offers by reason of lack of "sufficient cooperation" is based on any reason consistent with WTO rules. In addition, if Chinese authorities do not provide the exporter the reasons of rejection or an opportunity to make comments, violation of WTO rules will arise. In its written reply to questions from Mexico in the Committee on Anti-Dumping Practices, China explained that, if a company does not cooperate during the investigation process, it would be difficult to determine whether the company's observance of such price undertaking could be effectively monitored.[80] Thus, China deems that it is impractical to accept such offers. This rationale is not persuasive, however, because there is no necessary correlation between the behaviours of the companies during the investigation process and the undertaking implementation process. Moreover, Article 8.6 of the Anti-Dumping Agreement has already provided the anti-dumping authorities with effective tools of monitoring uncooperative exporters, i.e. the power to collect information from the exporters and to apply provisional measures using the best information available in the event of violation of an undertaking.

Secondly, according to the Chinese Anti-Dumping Regulations, if exporters breach price undertaking arrangements, Chinese authorities may resume investigations based on the best information available, and decide to apply provisional measures and levy anti-dumping duties retroactively on the products imported within 90 days prior to the application of such provisional anti-dumping measures, provided that the products imported before the

77 Article 35, Anti-Dumping Regulations.

78 Article 11, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.

79 Article 8.3, Anti-Dumping Agreement.

80 Committee on Anti-Dumping Practices, Committee on Subsidies and Countervailing Measures, Notification of Laws and Regulations Under Articles 18.5 and 32.6 of The Agreements, Replies to the Questions from Mexico Regarding the Notification of China, G/ADP/Q1/CHN/43, G/SCM/Q1/CHN/43, 23 April 2004, 7.

violation of the undertaking are not subject to such retroactive duties.[81] This rule of a "90 days retroactive application" has no problem of inconsistency because basically it conforms to WTO rules.[82]

The Provisional Rules on Price Undertakings further stipulates that if the definitive anti-dumping duty established in the final determination is lower than the amount of cash deposit established in the preliminary determination, the difference must be refunded.[83] This provision is compatible with the principle of refund under the Anti-Dumping Agreement.[84]

However, a serious problem of inconsistency with WTO rules arises from the subsequent part of the rules stating that "if the definitive anti-dumping duty established in the final determination is higher than the amount of cash deposit established in the preliminary determination, the difference shall be levied".[85]

According to the WTO Anti-Dumping Agreement, in case of violation of an undertaking, the authorities may take provisional measures using the best information available.[86] In such cases, definitive duties may be levied "in accordance with this Agreement" on products entered for consumption not more than 90 days before the application of such provisional measures.[87] Another WTO provision stipulates that "if the definitive anti-dumping duty is higher than the provisional duty paid or payable, the difference shall not be collected".[88] This provision has no exception clause that is applicable for the case of violation of price undertakings.

From these WTO rules, it can be concluded that any collection of the differences (if the definitive anti-dumping duty is higher than the provisional duty paid or payable) in the case of violation of undertakings cannot be qualified as levying definitive duties "in accordance with this Agreement" within the meaning of WTO rules. Such collection will lead to violation of the WTO Agreement.

Indeed, it is difficult to find any policy rationale to collect such differences from the exporter or producer who had breached undertakings. It is not likely that exporters or producers trying to breach undertakings will be discouraged from doing so because of possible retroactive collection of differences. The exporters or producers are fully aware that they will be subject to the disadvantage of the best information rule available in the case of breach, and therefore, any possible retroactive collection is not likely to further discourage them. In other words, as deterrence against breach of undertakings, immediate imposition of provisional duties based on the best information available will be sufficient. Additional

81 Article 36, Anti-Dumping Regulations; Article 27, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.

82 Article 8.6, Anti-Dumping Agreement.

83 Article 27, Provisional Rules on Price Undertakings in Anti-Dumping Investigations.

84 Article 10.3, Anti-Dumping Agreement ("... the difference shall be reimbursed...").

85 Article 27, Provisional Rules on Price Undertakings in Anti-Dumping Investigations (".... .").

86 Article 8.6, Anti-Dumping Agreement.

87 Above n.85.

88 Article 10.3, Anti-Dumping Agreement.

punishment of the retroactive collection of duties only upon exporters or producers who have breached undertakings can hardly be justified.

III. WTO consistency of post-anti-dumping measure procedure

III.A. Interim review[89]

According to the Anti-Dumping Regulations of China, an anti-dumping duty is imposed for a period of 5 years, and effects of a price undertaking also last for 5 years.[90] However, the period for anti-dumping duty levies may be extended as appropriate if, as a result of the review, it is determined that the termination of the duty would be likely to lead to continuation or recurrence of dumping and injury.[91] This review is called a ''sunset review'' under the WTO Anti-Dumping Agreement.[92]

In addition, the Chinese Regulations has provisions on the interim review. After a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, MOFCOM may decide to review the need for the continued imposition of the anti-dumping duty.[93] Such a review may be conducted upon request by any interested party or on MOFCOM's own initiative.[94] An interim review is defined in the Provisional Rules on Interim Review of Dumping and Dumping Margin as follows:

> ''. . . reviews, conducted during the period that anti-dumping measures are effective, on the necessity of whether to continue those measures under the original form and at the original level given the facts that the normal value and export price have changed since the anti-dumping measures entered into force''.[95]

The Chinese Regulations and provisional rules elaborate conditions and procedures that are applicable to reviews, which are absent in the WTO Anti-Dumping Agreement. Considering that one of the problems of current WTO system, expressed by many commentators and DDA negotiators, is the absence of rules and procedures applicable to reviews, this position taken by Chinese law is exemplary.

Among these conditions and procedures, several ones are noteworthy. First, the Chinese Regulations and provisional rules provide that any application of review may be made after ''one year has elapsed'' since the imposition of the definitive anti-dumping duty, and that the time period of carrying out the review is ''within 12 months''.[96] Under WTO rules, reviews

89 In general, a ''review'' in an anti-dumping procedure includes a periodic review (or administrative review), in which original dumping margins are reassessed, and a ''changed circumstances review'' where terminations of original dumping determinations are decided. For the purpose of this paper, an ''interim review'' means a changed circumstances review.

90 Article 48, Anti-Dumping Regulations.

91 Above n.89.

92 Article 11.3, Anti-Dumping Agreement.

93 Article 49, Anti-Dumping Regulations.

94 Above n.92. Article 4, Provisional Rules on Interim Review of Dumping and Dumping Margins.

95 Article 3, Provisional Rules on Interim Review of Dumping and Dumping Margins.

must be initiated upon legitimate requests by interested parties after a "reasonable period of time" since duty impositions.[97] Thus, one can say that this "reasonable period" is interpreted as "one year" in Chinese law. Given that one year is not an unreasonably long period of time, this interpretation is consistent with the WTO agreement.

Also consistent is the 12 months time limit for conducting reviews. According to WTO rules, any review must "normally" be concluded within 12 months of the date of initiation of the review.[98] Because the 12 months period is stated as a normal (not absolute) period in the WTO agreement, oftentimes review periods have been delayed beyond this time limit. Therefore, this matter of limiting the review period strictly to one year has remained a hot issue in current DDA negotiations.[99] Therefore, the Chinese provision above set a good example by imposing the maximum review period of 12 months without any exceptions.

Second, the WTO Anti-Dumping Agreement does not apply to interim reviews any procedural or substantive rules of original anti-dumping investigations or determinations except the provision on evidence.[100] As a result, anti-dumping authorities of many WTO members have applied arbitrary standards and rules in the review proceedings. By contrast, Chinese anti-dumping regulations and rules prescribe many provisions related to reviews, and provide that the review proceedings must be conducted with reference to the relevant provisions of the original anti-dumping investigations.[101] To confirm this principle of reference, the Provisional Rules on Interim Review of Dumping and Dumping Margin make explicit references to the provisions applicable to original investigations with regard to such matters as sampling methods for the investigation, comparisons of normal value and export price, calculations of dumping margin, on-the-spot verifications and price undertakings.[102] This legislation is praiseworthy because it strengthens procedural controls over review proceedings which tend to be vulnerable to political pressures from domestic interest groups. With such controls, interim reviews in China will proceed in a more transparent and non-arbitrary manner.

Third, it seems that sunset review proceedings in China are also conducted with reference to the relevant provisions of original anti-dumping investigations and must be concluded within 12 months from the date of initiation.[103] However, there is no provision under the Chinese Regulations and rules that indicate that the detailed provisional rules for interim reviews also apply to sunset review proceedings. Therefore, it is not clear how MOFCOM will proceed with sunset reviews and which rules it will apply. One way to solve this problem is to provide a reference clause in the Provisional Rules on Interim

96 Article 51, Anti-Dumping Regulations; Article 36, Provisional Rules on Interim Review of Dumping and Dumping Margins.

97 Article 11.2, Anti-Dumping Agreement.

98 Article 11.4, WTO Anti-Dumping Agreement.

99 See TN/RL/GEN/10, TN/RL/W/83, TN/RL/W/10 (by Friends); TN/RL/W/138 (by EU and Japan); TN/RL/W/66 (by China).

100 Article 11.4, Anti-Dumping Agreement.

101 Article 51, Anti-Dumping Regulations;

102 Articles 29, 30, 32 and 35, Provisional Rules on Interim Review of Dumping and Dumping Margins.

103 Interpretation of Articles 48 and 51 of the Anti-Dumping Regulations.

Review of Dumping and Dumping Margin, by which procedural rules of interim reviews apply also to sunset review proceedings *mutatis mutandis*.

Fourth, according to the general interpretation of WTO rules, the burden of proving whether it is necessary to continue to impose anti-dumping duties, and whether expiry of the duty would be likely to lead to recurrence of dumping and injury, must be borne by the investigation authorities.[104] This matter of burden of proof is not clarified under the Chinese Regulations and rules, despite their detailed provisions on interim reviews. If MOFCOM forces exporters or producers to demonstrate, as a precondition of termination of anti-dumping measures, that continued impositions of anti-dumping duties are not necessary, or expiry of the duty would be unlikely to lead to recurrence of dumping and injury, WTO violations will occur. Many states or enterprises trading with China will watch whether such a shift of burden arises in Chinese anti-dumping review proceedings.

III.B. Retaliatory measures

Article 7 of the Foreign Trade Law of China prescribes that:

> ''In the event that any country or region applies prohibitive, restrictive or other like measures on a discriminatory basis against the People's Republic of China in respect of trade, the People's Republic of China may, as the case may be, take countermeasures against the country or region in question''.[105]

This clause provides a great discretionary power for retaliation to the Chinese authorities. Any restrictive or discriminatory measures ''in respect of trade'' may be subject to this countermeasure system. Therefore, if any country takes discriminatory trade remedy measures, including anti-dumping or countervailing measures, against Chinese exports, China may take similar trade remedy measures against its exports.

Compatibility of this countermeasure system with the WTO agreement is controversial. Article 7 as such is not inconsistent with the agreement because it is a discretionary (not mandatory) provision.[106] But, if any countermeasure is actually taken based on the clause, compatibility of such an applied measure with the WTO agreement is highly questionable.

The Anti-Dumping Regulations of China embodies this countermeasure system in the context of anti-dumping procedures. Article 56 of the Regulations prescribes that:

> ''Where a country (region) discriminatorily imposes anti-dumping or countervailing measures on the exports from China, China may, on the basis of the actual situations, take corresponding measures against such country (region)''.[107]

104 See e.g. Panel Report, *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521.

105 Article 7, Foreign Trade Law.

106 Article 7 (''. . . may. . .'').

107 Article 56, Anti-Dumping Regulations (‘‘, ’’).

For the countermeasures, the State Council department in charge of foreign trade may conduct investigations of foreign trade barriers.[108] Even though this investigation provision has rarely been invoked,[109] its very existence shows that China is well prepared to retaliate against foreign trade restrictions with corresponding measures. Indeed, this system provides an effective trade remedy tool for China and exercises a sizable potential threat upon its trading partners, given the considerable economic clout that China carries.

This provision raises many interpretive issues in regard to the meanings of "discriminatory imposition" of anti-dumping measures, "corresponding measures" and "on the basis of the actual situations". An example of discriminatory imposition of anti-dumping duties is the case in which a foreign state investigates and imposes anti-dumping measures against allegedly dumped Chinese products, while third country products in dumping are exempted from the investigation. In this kind of targeted anti-dumping situation, China may attempt to take corresponding measures against imported products of the foreign state. Under the WTO agreements, Members usually cannot take any retaliatory measures against other WTO members unless the WTO Dispute Settlement Body has made an affirmative determination of violation of WTO obligations by the other party,[110] and any countermeasures in the form of anti-dumping duty may be taken only after the conclusion of anti-dumping investigations duly conducted pursuant to the Anti-Dumping Agreement. To be consistent with this international norm, the terms "on the basis of the actual situations" in the Chinese Regulations must be interpreted to mean "if the case satisfies all conditions stated under the WTO Agreement", and China is obliged to pursue retaliations consistently with the WTO dispute settlement procedure. In other words, if China takes corresponding anti-dumping measures in a situation where such conditions are not satisfied, WTO violation will occur.[111]

In addition, certain situations in which retaliation is necessary cannot be seen as "special circumstances" within the meaning of the Anti-Dumping Agreement.[112] Therefore, MOFCOM cannot initiate anti-dumping investigations without petitions from the domestic industry even if a foreign state has imposed a discriminatory anti-dumping duty. Instead, the MOFCOM may only self-initiate an investigation if "special circumstances" other than the mere imposition of discriminatory anti-dumping duty by a foreign country exist.

Given the broadly defined discretionary powers, it is always possible for this system to be abused and applied inconsistently with WTO jurisprudence. According to the Provisional Rules Governing Investigations of Foreign Trade Barriers,[113] domestic enterprises or

108 Article 37, Foreign Trade Law.

109 It was put into action in the 2004 Japan—Laver case. See e.g. MOFCOM Notice 10 of 2005 on Terminating the Trade Barrier Investigation on the Import Control Measures on Laver by Japan.

110 Article 23 of the DSU. Under the WTO Safeguards Agreement, however, Members affected by a safeguard measure can retaliate against the Member imposing such measure under limited circumstances. See Article 8 of the Agreement on Safeguards.

111 Violations of Article 5 of Anti-Dumping Agreement and Article I of GATT.

112 Above n.33 and 34 and texts thereto.

113 Provisional Rules on Foreign Trade Barrier () (Promulgated by MOFTEC order no. 31, 2002).

industries may file an application to MOFCOM for investigations into foreign trade barriers.[114] If trade barriers are found to exist, MOFCOM may conduct bilateral consultations, resort to multilateral dispute settlement mechanism, or adopt other appropriate measures.[115] Therefore, in order to conform to WTO rules, China should resort to multilateral dispute settlement mechanism such as the WTO dispute settlement procedure when an issue of discriminatory imposition of anti-dumping measures by foreign states arises; or, it must take corresponding measures pursuant to rules and procedures of the Anti-Dumping Agreement.

Indeed, China has confirmed that the term ''corresponding measures'' refers to ''the measures China is entitled to take after recourse to the dispute settlement procedures pursuant to the Anti-Dumping Agreement and the DSU if the counterpart country is a WTO member.[116]

IV. Conclusion

China's modern legal system, dating from reforms begun in 1978,[117] is barely over two and a half decades old. Trade remedy regulations of China merely dates back to the establishment of the WTO. During this short period of time, China made large-scale efforts to shape its trade remedy system through legal and organizational changes. While the overall improvements to the trade remedy system of China are evident, definitions of several key legal terms are absent, and some legal problems and issues remain to be solved and clarified. Of course, the silence in Chinese law and regulations *per se* does not lead to violations of WTO obligations. In many parts of the Chinese laws and regulations, such as Article 142 of the General Principles of the Civil Law of the People's Republic of China and Article 9 of Rules on Administrative Cases on International Trade, it is declared that the domestic laws of China must be interpreted in a way that is most compatible with its international obligations. In addition, the Chinese government has frequently indicated its willingness to observe WTO rules when there are no corresponding provisions in its domestic laws.[118] Beyond this declaration of the principle of interpretation of domestic laws and expression of political will, China should continue to proceed with the task of clarification and improvement of its trade rules.

114 Article 5, Provisional Rules on Foreign Trade Barriers Investigations.

115 Above n.113, Article 29.

116 Committee on Anti-Dumping Practices, Committee on Subsidies and Countervailing Measures, Notification of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements, Replies to the Questions from the United States Regarding the Notification of China, G/ADP/Q1/CHN/33, G/SCM/Q1/CHN/33, 24 October 2003, reply to Question 37.

117 The legal system of China was utterly abolished during the Cultural Revolution period (1966–1976). Deng Xiaoping introduced a new economic reform program and resuscitated the legal system in China in 1978. See generally Daniel Chow, above n.13, Chapters 1–3.

118 See e.g. Committee on Anti-Dumping Practices, Committee on Subsidies and Countervailing Measures, notification of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements, Replies to the Questions Posed by the United States Regarding the Notification of China, G/ADP/Q1/CHN/19, G/SCM/Q1/CHN/19, 7 May 2003, especially the replies to questions 4 and 5.

It seems that with the establishment of MOFCOM, organizational reforms in the Chinese trade remedy system have been completed. The Ministry, as a new organization in charge of trade remedy matters, will adopt many procedural rules replacing temporary rules made by MOFTEC and SETC. In this process, such problems and issues as identified in this article must be duly dealt with in order to make the system more transparent and consistent with international norms.

Given the size of Chinese economy and the influence of Chinese trade remedy policies, this issue is vital and pressing not only to Chinese domestic enterprises and consumers, but also to most of the trading communities in the world.

Annexes: Anti-Dumping Laws and Regulations of China

Annex A. Anti-Dumping Laws and Regulations of China

Legislative body	Title of laws and regulations	Date of adoption/ promulgation/effectuation
NPC	Foreign Trade Law of the People's Republic of China	Adopted on 12 May 1994, Became effective on 1 July 1994
State Council	Anti-Dumping and Anti-Subsidy Regulations of the People's Republic of China	Adopted on 25 March 1997, repealed in November 2001
	Anti-Dumping Regulations of the People's Republic of China	Promulgated on 26 November 2001

Annex B. Implementing rules on Anti-Dumping Investigations of China

Legislative body	Title of rules	Date of promulgation/ effectuation
MOFTEC	Provisional Rules on Hearings in Anti-Dumping Investigations	Promulgated on 16 January 2002, became effective on 22 January 2002
	Provisional Rules on Initiation of Anti-Dumping Investigations	Adopted on 10 February 2002, became effective on 13 March 2002
	Provisional Rules on On-the-spot Verification in Anti-Dumping Investigations	Adopted on 13 March 2002, became effective on 15 April 2002
	Provisional Rules on Anti-Dumping Investigation Questionnaire	Adopted on 13 March 2002, became effective on 15 April 2002
	Provisional Rules on Sampling in Anti-Dumping Investigation	Adopted on 13 March 2002, became effective on 15 April 2002

(*Table continued*)

Annex B (continued)

Legislative body	Title of rules	Date of promulgation/ effectuation
	Provisional Rules on Information Disclosure in Anti-Dumping Investigations	Adopted on 13 March 2002, became effective on 15 April 2002
	Provisional Rules on Access to Non-Confidential Information in Anti-Dumping Investigations	Adopted on 13 March 2002, became effective on 15 April 2002
	Provisional Rules on Price Undertakings in Anti-Dumping Investigations	Adopted on 13 March 2002, became effective on 15 April 2002
	Provisional Rules on New Shipper Review in Anti-Dumping Investigations	Adopted on 13 March 2002, became effective on 15 April 2002
	Provisional Rules on Refund of Anti-Dumping Duties	Adopted on 13 March 2002, became effective on 15 April 2002
	Provisional Rules on Interim Review of Dumping and Dumping Margins	Adopted on 13 March 2002, became effective on 15 April 2002
SETC	Rules on Public Hearings on Investigations on Industry Injury	Became effective on 15 January 2003
	Rules on Investigations and Decisions of Industry Injury in Anti-Dumping Investigations	Promulgated on 13 December 2002, Became effective 15 January 2003, Repealed on 17 November 2003
MOFCOM	Rules on Industry Injury in Antidumping Investigations	Promulgated on 17 October 2003, Became effective on 17 November 2003